No. 82-5534

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1982

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SUPREME COURT, U.S.

WILLIAM MELVIN WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Supreme Court, U.S.
FILED
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether, in affirming the imposition of the Petitioner's sentence of death, the Florida Supreme Court has adopted such a broad and vague construction of the "hinder ... governmental function" aggravating circumstance as to violate the Eighth and Fourteenth Amendments?

2. Whether Petitioner's death sentence was imposed in the trial court and upheld in the Florida Supreme Court without "the type of individualized consideration of mitigating factors ... required by the Eighth and Fourteenth Amendments in capital cases," Lockett v. Ohio, 438 U.S. 586, 606 (1978)?

3. Whether the Florida Supreme Court's cursory, mechanical "review" of the aggravating and mitigating circumstances in Petitioner's case, in which the Court failed to address or redress substantial Eighth Amendment Violations in the assessment of both aggravating and mitigating circumstances, fulfilled the Court's Eighth-Amendment-based "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Proffitt v. Florida, 428 U.S. 242, 251 (1976)?

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October Term, 1982

WILLIAM MELVIN WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on April 1, 1982, rehearing having been denied July 8, 1982.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Case No. 55,875 is reported as White v. State, 415 So.2d 719 (Fla. 1982) and is set out at pages 6a-8a in the Appendix hereto. Although rehearing was denied by the Supreme Court of Florida, the original opinion was modified on rehearing. Accordingly, the original opinion and the order on rehearing are set out at pages 1a-4a and 5a respectively in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on April 1, 1982, and petitioner's timely motion for rehearing was denied by order dated July 8, 1982. (As noted, the order denying rehearing is set out at page 5a of the Appendix). On August 27, 1982 Justice Powell signed an order extending the time for filing the petition for writ of certiorari to and including October 6, 1982. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case further involves Section 921.141, Florida Statutes (1977), entitled: "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length, the statute is set out in its entirety at pages 9a-10a of the Appendix.

STATEMENT OF THE CASE

On July 11, 1978, William Melvin White (Petitioner) and Richard DiMarino were indicted for the first degree murder of Gracie Mae Crawford (R 1376).[1] Guy Ennis Smith was separately indicted for the same murder.[2] DiMarino was tried first, was convicted of third degree murder, and was sentenced to fifteen years' imprisonment (R 466, 470). Thereafter, pursuant to a plea bargain in which terms of imprisonment for other charges against him would be served concurrently with his sentence for the Crawford murder (R 469-470), DiMarino testified against Petitioner (R 461-544) and Smith (Smith v. State, supra).

The State's evidence in Petitioner's trial, produced primarily through the testimony of Richard DiMarino, revealed that at approximately 2:45 A.M. on June 7, 1978 Gracie Mae Crawford left a bar in Orlando, Florida in the company of five other people, including Richard DiMarino and Guy Ennis Smith (R 181, 184, 186, 192). Ms. Crawford and her companions went to a house in Orlando where the Petitioner had gone earlier in the evening (R 287-290). Upon the group's arrival at this house, DiMarino woke up Petitioner and informed him that Ms. Crawford was there, that she had been talking about liking Black people at the bar, and that as a result she "ought to be trained by a bunch of us." (R 474) Petitioner responded to DiMarino's overture, and DiMarino, Smith, and Petitioner

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[1] The letter "R", followed by the appropriate page numbers, will be used to designate references to the Record on Appeal before the Supreme Court of Florida.

[2] See Smith v. State, 403 So.2d 933 (Fla. 1981)

joined together in beating Ms. Crawford (R 475-477). Thereafter, DiMarino and Petitioner escorted Ms. Crawford to a car (R 480-482), and as they left, according to DiMarino, were given the following instructions by Smith:

> "[Mr. Smith] said he didn't want any witnesses, that he didn't... if we were going to take care of business, not to run a sloppy act."

(R 482) DiMarino understood this as an order "to take Gracie Mae Crawford and to kill her." (R 484)[3] DiMarino then drove Ms. Crawford to a remote area of Orange County where, according to DiMarino, he and Petitioner took Ms. Crawford out of the car, Petitioner stabbed Ms. Crawford in the chest and cut her throat, and he also cut her throat (R 485-486, 490-492).

Since there were no other witnesses to the killing of Ms. Crawford (R 543-544), DiMarino's testimony against Petitioner was critical to the State's case. However, substantial evidence was presented to call into question DiMarino's truthfulness. For example, DiMarino's brother testified that DiMarino admitted to him the day after the homicide that he (DiMarino) had killed Ms. Crawford by stabbing her and cutting her throat (R 605). While also informing his brother that Petitioner was with him when this happened, DiMarino inferred that Petitioner had done nothing because he was so intoxicated (R 613). DiMarino testified that he had been arrested forty or fifty times (T 657-658, 667), and that he could remember being convicted of felonies (rape, robbery, burglary, drug-related offenses, weapons offenses, and resisting arrest) five to ten times (R 674-675). Moreover, DiMarino admitted that he would readily lie when lying served his interest.

> "Q... You are wavering as to whether or not you consider yourself a truthful person, is that a correct statement?
>
> A. [DiMarino] Yes.
>
> Q. And you say you are prone to tell lies, is that a correct statement?
>
> A. Yes.
>
> Q. And you tell the truth only where you feel like it?

[3]This order from Smith had great significance to DiMarino, for Smith was the "regional enforcer" for all the chapters in Florida of the motorcycle club to which Smith and DiMarino belonged (R 483). As regional enforcer, Smith's job was to watch over and make sure if

A. Yes.

Q. And you really don't care whether you tell a truthful statement or a falsification, do you?

A. It depends on the circumstances.

Q. That is what I was getting to. Since you are prone to telling lies, you tell the truth only when it suits your fancy, so to speak?

A. Yes."

(R 505-506) Finally, DiMarino testified that he had reached a bargain with the State that in exchange for his testimony, the sentences of five years for two other charges facing him would be served concurrently with his sentence of fifteen years for his third degree murder conviction for the Crawford homicide (R 469-470).

On the basis of this evidence, the jury convicted Petitioner of first degree murder (R 1582) and recommended that he be sentenced to death (R 827, 1629). The trial judge immediately imposed a death sentence (R 832) and filed findings of fact in support of the sentence eight days later (R 1645-1650).[4] The Supreme Court of Florida sustained the imposition of the sentence of death entirely upon the following cursory description of the penalty proceeding.

> "The jury unanimously recommended the imposition of the death sentence. The trial judge found three aggravating factors and recited his reasons therefor. [Footnote, setting out the findings, omitted.] No testimony was presented of any mitigating circumstances, statutory or nonstatutory, but the trial judge found the mitigating circumstance of no previous felony convictions. We are satisfied that the trial judge weighed the aggravating circumstances against this and any other mitigating circumstances in pronouncing sentence. The findings of the trial judge are supported by the evidence, and his judgment should not be disturbed. In affirming the sentence we are fully aware that DiMarino escaped with a conviction of a third-degree murder. While this is fortunate for him, it does not require the reduction of White's sentence. White was the executioner, and his sentence is warranted."

White v. State, supra, 415 So.2d at 720-721 (Appendix filed herewith, pp. 7a-8a).

Footnote 3 continued:

trouble starts, he intervenes or if he wants something taken care of, he has it taken care of [] [o]r, he takes care of it himself." (Id.)

[4]The judge found the existence of three aggravating circumstances [the murder was committed in the course of committing a kidnapping, Fla. Stat. 921.141 (5)(d); the murder was committed to disrupt or hinder the enforcement of laws.

REASONS FOR GRANTING THE WRIT

I.

IN AFFIRMING THE IMPOSITION OF PETITIONER'S SENTENCE OF DEATH, THE FLORIDA SUPREME COURT HAS ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE "HINDER ... GOVERNMENTAL FUNCTION" AGGRAVATING CIRCUMSTANCE AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

One of the aggravating circumstances provided for the sentencer's consideration in a Florida death penalty case is whether "[t]he capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." Fla. Stat. §921.141 (5) (g). The trial judge found this circumstance in Petitioner's case upon an assumption that the motive in killing the victim was "to escape detection and punishment for the crime of aggravated battery" previously committed against her (R 1649). The Florida Supreme Court's approval of the application of this aggravating circumstance in Petitioner's case represents such a broad and vague construction of this circumstance that there is no principled way to distinguish the cases in which it is present from those in which it is not. Accordingly, this aggravating circumstance fails to channel sentencing discretion as required by the Eighth and Fourteenth Amendments.

In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court held that a death penalty statute's aggravating circumstances must be sufficiently limited to provide a principled basis for determining the presence of the circumstances in some cases and their absence in others. Although the state courts remain free to develop their own limiting constructions of aggravating circumstances,[5] the limiting constructions must, as a matter of Eighth Amendment law, be both instructed to sentencing juries, id. at 428-429 and consistently applied from case to case. id. at 429-433. In Godfrey, the Court examined the use of one particular

Footnote 4 continued:

Fla. Stat. §921.141 (5)(g); the murder was especially heinous, atrocious, or cruel, Fla. Stat. §921.141 (5)(h)] and one statutory mitigating circumstance [no prior felony convictions, Fla. Stat. §921.141 (6)(a)].

[5]But presumably, only if such constructions are consistent with each other. See Godfrey v. Georgia, at 431.

aggravating circumstance. It first found the jury instruction concerning this circumstance deficient for failing to limit the circumstance in any meaningful way. Id. at 428-429. The Court then examined the facts of the case and determined that, while the Georgia Supreme Court had developed three "separate but consistent" criteria limiting the application of this circumstance, "[t]he circumstances of this case ... do not satisfy the criteria laid out by the Georgia Supreme Court itself...." Id. at 431, 432. Since the Georgia courts had failed to keep this aggravating circumstance within the bounds determined by the presence of specific facts, the circumstance did not guide discretion, and the death sentence was set aside.

Petitioner submits that the Florida Supreme Court's approval of the application of Florida's "(5)(g)" aggravating circumstance in his case has similarly unleashed sentencing discretion with respect to this circumstance.

As detailed in the Statement of the Case, the charge against Petitioner included his participating in an alleged aggravated battery of the victim prior to her being killed. Shortly after the battery, the victim was transported elsewhere and killed. The evidence indicated that the victim's murder was nothing more than the continuation of the battery, motivated by the same racial and sexual animus which had motivated the battery in the first place. The only evidence possibly giving rise to the trial judge's finding that the victim was killed in order to prevent "detection and punishment for the crime of aggravated battery" (R 1649) was the statement by Guy Smith that "he didnt't want any witnesses, that he didn't ... if we were going to take care of business, not to run a sloppy act." (R 482) On the basis of the Florida Supreme Court's construction of the (5) (g) aggravating circumstance, both prior to and since the decision in Petitioner's case, this evidence does not satisfy the criteria developed by the Florida Supreme Court to limit the application of this circumstance.

Similar to the (b)(7) circumstance in Godfrey, a finding of the (5) (g) circumstance in Florida [that "[t]he capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws"] does not

"standing alone, ... impl[y] any inherent restraint on the arbitrary and capricious infliction of the death sentence." Godfrey v. Georgia, supra, 446 U.S. at 428. Any homicide could reasonably be characterized as hindering the enforcement of laws since enforcement of the laws punishing homicide are hindered by the elimination of the person who is generally the best witness: the victim of the homicide. In considering the related (5) (e) aggravatingcircumstance ["[t]he capital felony was committed for the purpose of avoiding or preventing arrest ...."], the Florida Supreme Court has recognized this general applicability of the (5) (e) circumstance to every homicide, and has accordingly held that "the mere fact of death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." Riley v. State, 366 So.2d 19, 22 (Fla. 1979). While the court has not explictly held the same limitation to be applicable to the (5) (g) circumstance, by implication it has, for it has held that either (5) (g) or (5) (e), but not both, can be found when the homicide is committed in order to eliminate witnesses. See Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); White v. State, 403 So.2d 331, 338 (Fla. 1981); Francois v. State, 407 So.2d 885, 891 (Fla. 1981); Ferguson v. State, 417 So.2d 639, 643 (Fla. 1982) [striking one of the two circumstances as an "improper doubling" when both (5) (g) and (5) (e) have been found on the basis of the motive for the homicide being to eliminate a witness]. See Jones v. State, 411 So.2d 165, 168 (Fla. 1982) [upholding (5) (g) when the homicide was committed in order to eliminate witnesses to a robbery].

While the Riley limiting criteria may be equally applicable to (5) (e) and (5) (g) when there are facts tending to show that the homicide was motivated by the elimination of a witness, that limitation is irrelevant to Petitioner's case, for the trial court found that the homicide was not committed to eliminate a witness and thus avoid arrest. Specifically the trial court found

> "e) The murder of Gracie Mae Crawford was not committed for the purpose of avoidig or preventing a lawful arrest or effecting an escape from custody. Although it may be

> argued that the crime was committed for the purpose of avoiding or preventing a lawful arrest by hindering law enforcement officers from discovering the commission of an aggravated battery by Smith and his co-defendants and avoiding punishment and further that the murder was accomplished to eliminate the victim of their crime, the Court has taken the construction of this circumstance most favorable to the defendant and finds that these facts would be more appropriate under circumstance (g) below."

(R 1648-1649). In his findings concerning "circumstance (g)," the trial judge found only the following, at R, 1649:

> "g) the murder of Gracie Mae Crawford was committed to disrupt or hinder the enforcement of laws, i.e., to escape detection and punishment for the crime of aggravated battery. See circumstance (e) above. Circumstance "g" is applicable."

With these findings, the trial judge clearly did not utilize the Riley criteria, for he did not find, as required by Riley, "very strong" proof of "the requisite intent to avoid arrest," Riley v. State, supra, 366 So.2d at 22, by the elimination of a witness.[6] Instead, the trial judge applied an incomprehensibly vague standard which, on the basis of his written findings, could be applied whenever a homicide followed an aggravated battery to to the victim, regardless of the critical limiting factor in Florida of the defendant's motive in committing the subsequent homicide. Cf. Menendez v. State, supra ("This mechanical application of the statute would divert the life-and-death choice away from the nature of the defendant and the deed, as the statute seems to require.")

The only other limiting criterion which the Florida

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[6]Indeed, the trial judge could not have made such a finding, for the only evidence relevant to whether the homicide was committed to eliminate Ms. Crawford as a witness, the statement by Guy Smith, tended to show only that "if [Petitioner and DiMarino] were going to take care of business [i.e. kill Crawford]," they should be sure she died so as not to be a witness against them. (R 482) (emphasis supplied). Nothing in this statement by Smith suggests what Petitioner's motive may have been in killing Ms. Crawford. Moreover, even if it were an accurate reflection of Petitioner's state of mind, it would show at most that if Petitioner were motivated to kill Crawford, he should be sure he killed her. Even in this light, the evidence cannot be said to meet Riley's requirement of very strong proof of the intent to kill in order to eliminate someone as a witness. There was no such proof, and such a motive cannot be assumed. Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979)

Supreme Court has applied to (5) (g) is equally inapplicable to the facts of Petitioner's case. The Court has upheld the finding of this circumstance when the homicide has interfered with an ongoing, active governmental functi'.a. See Tafero v. State 403 So.2d 355, 362 (Fla. 1981); Raulerson v. State, 358 So.2d 826, 833-835 (Fla. 1978); Songer v. State, 322 So.2d 481, 484 (Fla. 1975) [all involving the murder of a police officer engaged in law enforcement duties]. See also Antone v. State, 382 So.2d 1205, 1216 (Fla. 1980) [involving the murder of a potential witness in an ongoing grand jury investigation, to prevent the witness from testifying]. Unquestionably, there was no such ongoing governmental function in which the victim in this case was a participant.

Accordingly, since no limiting instructions were provided to the jury concerning this circumstance (R 822, 1624), and since the circumstances of this case "do not satisfy the criteria laid out by the [Florida] Supreme Court itself," Godfrey v. Georgia, supra, 446 U.S. at 432, in Riley, Menendez, Tafero, Raulerson, Songer, and Antone, supra, Petitioner's death sentence must be vacated, for the sentencing tribunal's reliance on this aggravating circumstance unchanneled, rather than channeled, sentencing discretion.[7]

II

PETITIONER'S DEATH SENTENCE WAS IMPOSED IN THE TRIAL COURT AND UPHELD IN THE FLORIDA SUPREME COURT WITHOUT "THE TYPE OF INDIVIDUALIZED CONSIDERATION OF MITIGATING FACTORS ... REQUIRED BY THE EIGHTH AMENDMENT IN CAPITAL CASES," LOCKETT V. OHIO, 438 U.S. 586, 606 (1978).

In direct violation of Lockett v. Ohio, 438 U.S. 586 (1978), the consideration of mitigating circumstances by both the jury and the judge at Petitioner's trial was limited to the consideration

[7]While Petitioner submits that the principle of Stephens v. Zant, 631 F.2d 397, 406 (5th Cir. 1980), reh. denied and modified, 648 F.2d 446 (5th Cir.1981) requires the vacation of the death sentence and the provision of a new sentencing trial despite the Florida courts' reliance on two other aggravating circumstances, the Court may wish to withhold its final order pending resolution of Stephens before this Court. Zant v. Stephens, ___U.S.___, 102 S.Ct. 1856 (1982).

of only those factors enumerated in the Florida death penalty statue, Section 921.141(6), Florida Statutes (1977). There was evidence of non-statutory mitigating circumstances which could not, as a result, be considered in determining whether Petitioner would live or die. The operation of the Florida death penalty statute in Petitioner's case thus "prevent[ed] the sentencer... from giving independent mitigating weight to aspects of [Petitioner's] character and record and to circumstances of the offense proffered in mitigation" and created "the risk that the death penalty [was] imposed in spite of factors which [called] for a less severe penalty." Lockett v. Ohio, supra, 438 U.S. at 605.

Both the jury's and the judge's consideration of mitigating circumstances was confined to the seven factors enumerated in the Florida death penalty statute [Fla. Stat. 921.141(6)]. The instructions to the jury reasonably conveyed to the jury that they should consider only the seven statutory mitigating circumstances. With respect to aggravating circumstances, the jury was instructed that

> "[t]he aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence...."

(R 821) And as to mitigating circumstances, the jury was instructed that

> "[t]he mitigating circumstances which you may consider, if established by the evidence, are these: [listing only the seven statutory mitigating circumstances]."

(R 823) The parallel syntax in which these instructions were given, coupled with the absence of an instruction that the jury could consider mitigating circumstances not enumerated, could have been interpreted by a "reasonable juror," Sandstrom v. Montana, 442 U.S. 510, 514 (1979), to preclude the consideration of any non-enumerated miti-

gating factor.[8] See Washington v. Watkins, 655 F.2d 1346, 1369-1376 (5th Cir. 1981) (Unit A), cert. denied, ____U.S.____, 102 S.Ct. 2021 (1982).

In addition to limiting the jury's consideration of mitigating circumstances, the judge expressly limited his own consideration to the mitigating circumstances enumerated in the statute. His fact-findings concerned only the presence or absence of the statutory mitigating circumstances (R 1649-1650), and his sentence determination was expressly based only upon a consideration of the statutorily-specified mitigating circumstances.

> "This Court after weighing the aggravating and mitigating circumstances finds that sufficient aggravating circumstances exist as enumerated in Florida Statute 921.141 (5) to require imposition of the death penalty, and that there are insufficient mitigating circumstances, as enumerated in sub-section 6 [of the statute] to outweigh the aggravating circumstances."

(R 1638-1639)

Had the jury's and judge's consideration of mitigating circumstances not been improperly circumscribed, substantial mitigating circumstances, not encompassed within the statutory factors, were in evidence and available for consideration. For example, the disparate sentence of fifteen years' imprisonment received by Richard DiMarino for the murder of Ms. Crawford is a relevant factor in mitigation not covered by the statute that the jury was precluded from considering under the charge. Also mitigating is some doubt about Petitioner's guilt or at least about whether Petitioner was the one who actually committed the killing. DiMarino's version of the actual killing was wholly uncorroborated and, as recognized by the Florida Supreme Court, DiMarino was a "disreputable felon who had been granted favors by the state and who admitted he lied when it would 'suit [his] fancy.'" Smith v. State, supra, 403 So.2d at 935.

[8] This reasonable impression would have been further reinforced by the judge's pre-sentencing-hearing instruction that the hearing was "the part in which we talk about the aggravating and mitigating circumstances...." (R803) (emphasis supplied)

DiMarino thus had every reason to lie and had demonstrated his propensity to do so, giving rise to a very serious concern as to the equities between DiMarino and Petitioner. Moreover, DiMarino's testimony was contradicted by the statement he made to his brother admitting that it was he who did the killing and not Petitioner, who was too drunk to do anything.[9] If in fact DiMarino was the actual killer, the sentencing disparity was especially acute and unjust. And if the jury retained some doubt about whether Petitioner committed the actual killing, a doubt with some justification, such a doubt would be a relevant factor for the jury to consider in mitigation. Cf. Smith v. Balkcom, 660 F.2d 573, 579-582 (5th Cir. (1981); Green v. Georgia, 442 U.S. 95 (1979). These were compelling mitigating factors not allowable for consideration under the jury charge, and undisputably not considered by the judge.

Even though a particular death penalty statute may not on its face preclude the consideration of any mitigating circumstances,[10] the Lockett rule also prevents any application of such a statute in a particular case which does foreclose the consideration of some mitigating evidence. This Court was confronted with this very situation in Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982), in which the trial judge had refused to consider the defendant's violent family history in mitigation, and his refusal had been affirmed and compounded by the Oklahoma Court of Criminal Appeals. Because the courts refused to

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9 Petitioner's state of intoxication, while perhaps not rising to the level of a statutory mitigating circumstance [Fla.Stat. 921.141 (6)(b),(f)], could certainly have been considered in mitigation as well.

10 This Court has implied that the Florida Statute is such a statute, although the statute is ambiguous on its face, but the Court has never been directly presented with this issue. See Proffitt v. Florida, 428 U.S. 242, 250 n. 14 (1976); Lockett v. Ohio, supra, 438 U.S. at 606 & n. 15.

consider relevant mitigating evidence, this Court set aside Eddings' death sentence, for

> "[j]ust as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."

102 S. Ct. at 875-876 (footnote omitted) (emphasis in original). Thus, despite facial statutory compliance with the Eighth Amendment, a statute as applied in a particular case may nontheless violate the Eighth Amendment if all relevant mitigating evidence is not considered, for "Lockett requires the sentencer to listen." 102 S.Ct. at 876 n. 10.

The failure of the jury and the trial judge to consider all relevant mitigating evidence in Petitioner's case, together with the Florida Supreme Court's approval of such a limited consideration of mitigating circumstances, thus fundamentally prejudiced Petitioner's right to an individualized sentence determination.

III.

THE FLORIDA SUPREME COURT'S CURSORY, MECHANICAL "REVIEW" OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES IN PETITIONER'S CASE CONTRAVENED THE COURT'S DUTY TO "[GUARANTEE] THAT THE [AGGRAVATING AND MITIGATING] REASONS PRESENT IN ONE CASE WILL REACH A SIMILAR RESULT TO THAT REACHED UNDER SIMILAR CIRCUMSTANCES IN ANOTHER CASE," PROFFITT V. FLORIDA, 428 U.S. 242, 251 (1976).

The manner of review by the Florida Supreme Court in the instant case did not meet the constitutional requirements for appellate review enunciated in Proffitt v. Florida, 428 U.S. 242 (1976). In upholding the constitu-

tionality of Florida's capital sentencing scheme, this Court relied upon the Florida Supreme Court's "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case." Id. at 251. The appeal procedure was thus seen as an integral part of the task of a capital sentencing scheme: to remove arbitrariness from the imposition of the death sentence. In this Court's view, review by the Florida Supreme Court served as a final check against the arbitrary imposition of death sentences, for it was a system "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" Id. at 253.

This Court believed that the Florida Supreme Court would undertake "responsibly to perform its function of death sentence review with a maximum of rationality and consistency." Id. at 258. And that each case would be "conscientiously reviewed... to assure consistency, fairness, and rationality in the evenhanded operation of state law." Id. at 259-60. Upon this basis, Florida's form of review was thus deemed to be equivalent to the "specific form of review" provided by the Georgia Statute and, accordingly, was of crucial importance to the constitutionality of Florida's capital sentencing scheme. Absent this independent, conscientious, and reliable method of review, the Florida capital sentencing statute would be subject to the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238 (1972).

The Florida Supreme Court's opinion in the present case does not meet the assurances relied upon by the Court in Proffitt. In its singular lack of any analysis, despite serious constitutional questions, the Florida Supreme Court's opinion fails to meet the court's

constitutional responsbility. Instead the court's opinion suggests that it engaged in precisely the "cursory or rubber stamp review" that this Court trusted would not occur. Id. at 259. In Petitioner's case, the Florida Supreme Court merely quoted the aggravating circumstance findings by the trial court and stated that the judgment of the trial court should not be disturbed. The court ignored the finding of a mitigating factor by the trial court and failed wholly to analyze the aggravating factors.[11] One aggravating factor was especially in doubt [sec.(5)(g)] and presents a serious constitutional claim as to its definition and standards for application. Point I, supra. Substantial non-statutory mitigating circumstances were precluded from consideration in determining whether Petitioner would live or die. Point II, supra. Under these circumstances, the Florida Supreme Court has made a mockery of the Court's reliance upon it in Proffitt. Such a practice vitiates every principle governing death penalty cases since Furman and should not be tolerated by this Court.

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11 In the court's original opinion, the trial court's finding of a statutory mitigating circumstance (no prior felony convictions) was totally omitted from its discussion of the trial judge's findings. Appendix, p.3. When the court corrected this aspect of its opinion on rehearing, Appendix pp. 7-8, the correction was merely clerical. The court continued to give no weight to any facts in mitigation.

CONCLUSION

For the reasons expressed herein, the Petitioner, William Melvin White, respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street
West Palm Beach, Florida 33401
(305) 837-2150

BY Richard H. Burr, III
RICHARD H. BURR, III
Assistant Public Defender

Counsel for Petitioner

No. 82-5534

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1982

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SUPREME COURT, U.S.

WILLIAM MELVIN WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, William Melvin White, who is now imprisoned in the custody of the Florida Department of Corrections, asks to leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. Petitioner has attached hereto his affidavit in substantially the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY Richard H. Burr, III
RICHARD H. BURR, III
Assistant Public Defender

Counsel for Petitioner

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM MELVIN WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

A F F I D A V I T

I, WILLIAM MELVIN WHITE, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted of first degree murder and sentenced to death by the Circuit Court for Orange County, Florida. I appealed the judgment of conviction and sentence of death to the Florida Supreme Court and that court affirmed the judgment and death sentence. I am now petitioning for a writ of certiorari to the Supreme Court of the United States.

WILLIAM MELVIN WHITE

Duly witnessed and sworn to before me

this ____ day of _____, 1982.

NOTARY PUBLIC

No.

IN THE

SUPREME COURT OF THE UNITED STATES

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vs.

STATE OF FLORIDA,

Respondent.

A F F I D A V I T

I, RICHARD H. BURR, III, Counsel for Petitioner and a member of the Bar of this Court, depose and say:

1. That the enclosed Petition for Writ of Certiorari was mailed first-class postage prepaid at the Main Branch of the United States Post Office, West Palm Beach, Florida on October 6, 1982.

2. That the petition for writ of certiorari was mailed within the permitted time and was therefore timely filed under Rule 28, Section 2, of the Rules of this Court.

Richard H Burr, III

RICHARD H. BURR, III
Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

SWORN TO and SUBSCRIBED before me this 6th day of October, 1982.

Florestine Watson
NOTARY PUBLIC

Notary Public, State ...
My Commission Expires Sept. 23, 1986
Bonded Thru Troy Fain - Insurance, Inc.

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Respondent.

CERTIFICATE OF SERVICE

I, RICHARD H. BURR, III, hereby certify that I am a member of the bar of the Supreme Court of the United States, and that I have served copies of the Petition for a Writ of Certiorari together with the Appendix, Motion for Leave to Proceed in Forma Pauperis, and Notice of Appearance, in the above case on counsel for respondent by depositing same in the United States mail, first class postage prepaid, addressed as follows:

Honorable Sharon Lee Stedman
Assistant Attorney General
111 Georgia Avenue
Elisha Newton Dimick Building
West Palm Beach, Florida 33401

All parties required to be served have been served. Done this 6th day of October, 1982.

Richard H. Burr, III

RICHARD H. BURR, III
Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

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Respondent.

NOTICE OF APPEARANCE

The Clerk will enter my appearance as Counsel for WILLIAM MELVIN WHITE who in this Court is Petitioner.

I certify that I have been previously admitted to, and am a member in good standing of, the Bar of the Supreme Court of the United States.

Richard H. Burr, III

RICHARD H. BURR, III
Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401

The person to be notified on behalf of Petitioner in this case is the above counsel.